

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 169,044

ORDER

ON the 26th day of April, 1994, the application of the claimant and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey, dated January 28, 1994, came on for oral argument.

APPEARANCES

The claimant appeared by and through her attorney, Chris A. Clements of Wichita, Kansas. The respondent and insurance carrier appeared by and through their attorney, Leigh C. Hudson of Fort Scott, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, David J. Bideau of Chanute, Kansas. There were no other appearances.

RECORD

The record consists of documents filed of record with the Division of Workers Compensation in this docketed matter, including the transcript of regular hearing dated February 26, 1993 and exhibits attached thereto; the deposition of claimant dated March

23, 1993 and attached exhibits thereto; deposition of Ernest R. Schlachter, M.D. taken April 6, 1993; deposition of Jerry D. Hardin taken April 13, 1993; deposition of Scott Talbert taken on June 28, 1993 with attached exhibits; and deposition of George L. Lucas, M.D. taken on May 10, 1993.

ISSUES

1. Whether claimant's date of accident is September 1, 1990, or is a series of accidents through June 1, 1992.
2. Average weekly wage on the date of injury.
3. Nature and extent of claimant's disability, including work disability, if applicable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the evidence presented, the Appeals Board finds as follows:

The claimant began experiencing numbness in her fingers, hands, wrists and elbows shortly after commencing employment with respondent. She continued to work and reported her physical complaints to the company nurse on or about May of 1991. The claimant was seen by several doctors and eventually underwent surgery on her right hand by Dr. Storm in January of 1992 and he continued to treat her until March of 1992. The claimant has had no medical treatment since being released by Dr. Storm.

The claimant has returned to work for respondent in the production department and has worked in that capacity since March of 1992. The claimant currently experiences numbness and throbbing in both hands, arms and shoulders at all times.

The claimant testified and reported to Dr. Schlachter that her symptoms gradually worsened in both of her hands following surgery in January 1992 for approximately two months and thereafter stabilized. Her condition has remained stable since June of 1992. The claimant testified she had no problems with her shoulders until after the surgery in 1992. Dr. Schlachter testified that carpal tunnel problems most often continue to get worse with usage which corresponds with claimant's testimony.

(1) Based on the evidence in the record, the claimant has suffered a series of micro traumas to her hands, arms and shoulders on a daily basis which caused a worsening of her symptoms until June of 1992 and therefore the appropriate date for the date of accident should be June 1, 1992.

(2) The parties stipulated the average weekly wage for the two contested dates of accident and therefore the claimant's average weekly wage is found to be \$375.44 based on a June 1, 1992 date of injury.

(3) The claimant argues that the presumption found in K.S.A. 44-510e, 1991 Supp. against awarding work disability should not apply even though the claimant has returned to work in an accommodated position with the respondent at a comparable wage.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions to which his right to recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984). The claimant therefore has the duty to rebut the presumption of no work disability.

The claimant further alleges that the work she is doing is outside of the restrictions of both Dr. Lucas and Dr. Schlachter. However, Dr. Lucas did review a short video tape which showed 10 jobs which the claimant performed at the time of the injury. Dr. Lucas indicated some of the those jobs were within her restrictions and some were not. Limitations were placed on the claimant based upon the review of the video tape. The production supervisor of the respondent testified the company has accommodated claimant in regard to the restrictions of Dr. Lucas based upon Dr. Lucas' review of the tape and that all of her current job duties are within those restrictions. The claimant has returned to work for respondent at a comparable wage. The claimant testified she is physically able to perform her job and had not missed any work in the last several months prior to trial of this case.

K.S.A. 44-510e(a), 1991 Supp. provides a presumption of no work disability when the injured worker is returned to work at comparable wage. The primary purpose of the Workers Compensation Act is to restore the ability of the injured worker to work and earn comparable wages. As the respondent has accommodated the claimant and effectuated that purpose, the respondent should be entitled to the presumption under the Act. The claimant has the burden to overcome the presumption. Taking into consideration the facts in this case, the claimant has failed to overcome the presumption of no work disability.

(4) Dr. Schlachter rated the claimant's impairment at fourteen percent (14%) to the body as a whole. The claimant was seen one time by Dr. Schlachter at the request of claimant's attorney. Dr. Lucas rated the claimant at eight percent (8%) permanent partial impairment to the body as a whole. Dr. Lucas was hired by the respondent for the purpose of rating. Since both rating doctors were hired by the respective parties for the purpose of giving ratings, and considering the entire record, the Appeals Board finds the claimant's extent of disability to be eleven percent (11%) permanent partial to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the award of Special Administrative Law Judge William F. Morrissey dated January 28, 1994 is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS in favor of the claimant, Jackie L. Newberry, and against the respondent, Ozark Salad Company, and its insurance carrier, Travelers Insurance Company, and the Kansas Workers Compensation Fund for accidental injuries sustained on June 1, 1992 and based on an average weekly wage of \$375.44, the claimant is entitled to 6.43 weeks temporary total disability at the rate of \$250.31 per week or \$1,609.49 followed by 408.57 weeks at \$27.53 per week or \$11,247.93 for a 11% permanent partial general body disability making a total award of \$12,857.42.

As of June 30, 1994, there would be due and owing to the claimant 6.43 weeks temporary total compensation at \$250.31 per week in the sum of \$1,609.49 plus 102.14

weeks permanent partial compensation at \$27.53 per week in the sum of \$2,811.91 for a total due and owing of \$4,421.40 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$8,436.02 shall be paid at \$27.53 per week for 306.43 weeks or until further order of the Director.

The claimant is entitled to future medical treatment upon application.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Compensation and medical expenses awarded herein are to be paid two-thirds by the respondent and one-third by the Workers Compensation Fund.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed two thirds to the respondent and one third to the Workers Compensation Fund to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Martin D. Delmont Transcript of Regular Hearing of February 26, 1993	\$78.50
Deposition of Jackie L. Newberry	\$356.95
Todd Reporting Deposition of Ernest R. Schlachter, M.D.	\$186.44
Barber & Associates Deposition of Jerry D. Hardin	\$277.80
LaDell F. Lindsey Deposition of Scott Talbert	\$125.60

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, 1861 North Rock Road, Suite 320, Wichita, KS 67206
Leigh C. Hudson, P.O. Box 866, Ft. Scott, KS 66701
David J. Bideau, 18 North Forest, Chanute, KS 66720
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director